Supreme Court, U.S.
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In The
Supreme Court of the United States

LEONARD F. JOBE,

Petitioner,

v.

CITY OF CATLETTSBURG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does an ordinance criminalizing the placement of any leaflet under a car's windshield wiper without the owner's prior written consent – even if the owner or driver is willing to receive the leaflet – violate the First Amendment's Free Speech Clause?

PARTIES

The parties to the proceeding in the Sixth Circuit are contained in the caption. They are Leonard F. Jobe, Petitioner, and City of Catlettsburg, Respondent.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit [App. 1-25] is reported at 409 F.3d 261 (6th Cir. 2005). The opinion of the United States District Court for the Eastern District of Kentucky [App. 27-44] is unreported.

JURISDICTION

The Court of Appeals entered its judgment on May 6, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const., Amend. I.

"It shall be unlawful for any person to place or deposit or in any manner to affix or cause to be placed or deposited or affixed to any automobile or other vehicle or other automotive vehicle, any handbill, sign, poster, advertisement, or notice of any kind whatsoever, unless he is the owner thereof, or without first having secured in writing the consent of the owner."

Catlettsburg City Ordinance § 113.05.

STATEMENT OF THE CASE

Proceedings Below

This is an action for declaratory and injunctive relief under 42 U.S.C. § 1983, challenging an ordinance prohibiting the placement of leaflets under a car's windshield wiper. The district court had original jurisdiction under 28 U.S.C. § 1331 and the appeals court had jurisdiction under 28 U.S.C. § 1291.

On June 24, 2002, Petitioner Leonard F. Jobe (Jobe) filed suit, challenging Catlettsburg City Ordinance § 113.05 (the Ordinance), which prohibits the placement of leaflets under car windshield wipers. [District Court Record No. (R.) 1: Complaint.] After taking limited discovery, the parties filed cross-motions for summary judgment. On January 26, 2004, the district court issued its memorandum opinion and order granting Catlettsburg's summary judgment motion and denying Jobe's motion. [App. 26-44.]

From this adverse final judgment, Jobe filed his timely appeal. On May 6, 2005, the United States Court of Appeals for the Sixth Circuit issued its opinion affirming the judgment. *Jobe v. City of Catlettsburg*, 409 F.3d 261 (6th Cir. 2005) [App. 1-25].

Statement of Facts

Jobe serves as the Commander of American Legion Post 224 in Catlettsburg, Kentucky. [R.1: Complaint, ¶ 5.] Catlettsburg's population is under 2,000 people. *Jobe,* 409 F.3d at 262 [App. 2a]. Jobe occasionally distributes leaflets on behalf of the American Legion Post, himself, or

both. [R.1: Complaint, ¶ 6.] Jobe has found that one of the most efficient, cost-effective means of distributing these leaflets is for him to place them securely under the windshield wipers of cars parked on public property. [*Id.*, ¶ 7.] In other words, Jobe leaflets at a time when and place where he can reach the greatest number of citizens in a short time period – by delivering leaflets to cars parked on Catlettsburg's downtown streets – rather than driving from rural homestead to rural homestead, or waiting to encounter citizens who have come to town.

Catlettsburg has a city ordinance that prohibits the placement of leaflets under a car's windshield wiper. [*Id.*, ¶ 10; R.2: Answer, ¶ 1 (admitting allegation).] The Ordinance provides:

> It shall be unlawful for any person to place or deposit or in any manner to affix or cause to be placed or deposited or affixed to any automobile or other vehicle or other automotive vehicle, any handbill, sign, poster, advertisement, or notice of any kind whatsoever, unless he is the owner thereof, or without first having secured in writing the consent of the owner.

[R.1: Complaint, ¶ 10; R.2: Answer, ¶ 1 (admitting allegation).] The Ordinance was enacted in 1952. [R.26: Deposition of Mayor Hensley, p. 10.] Catlettsburg's mayor remembers it being enforced only once, against Jobe. [*Id.*, pp. 13-14.] Although Catlettsburg seeks to justify the Ordinance as a means to reduce littering, Mayor Hensley acknowledged that the ban on leaflets under car windshield wipers "really did not enhance" the City's anti-littering efforts, [*id.*, pp. 16-18]; moreover, no car owner has complained to him about leaflets and he knows of no

such complaints to city council members or the chief of police. [*Id.*]

ARGUMENT

This Court should issue a writ of certiorari to resolve a direct conflict between the Eighth and Sixth Circuits on this important free speech question. The Court also should issue the writ because of the importance of protecting the rights of persons seeking to distribute leaflets cheaply and efficiently.

I. THE COURT SHOULD RESOLVE A DIRECT CIRCUIT SPLIT.

The Catlettsburg ordinance upheld by the Sixth Circuit in *Jobe* is virtually identical to ordinances struck down by the Eighth Circuit in *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1215 (8th Cir. 1998), *cert. denied*, 527 U.S. 1037 (1999). The *Krantz* ordinances provided:

> SECTION 3. It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill or other hand-distributed advertisement upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, [or] alley within the City of Van Buren providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to the receiver therefor, any handbill to any occupant of the vehicle that is willing to accept it.

Id., 160 F.3d at 1216 (quoting Van Buren, Ark., Ordinance No. 5-1983).

Krantz involved three identical Arkansas town ordinances. The Eighth Circuit declared the ordinances overbroad and thus facially invalid because they were not narrowly tailored to serve a significant government interest. *See Krantz*, 160 F.3d 1214. The Eighth Circuit recognized that the government must establish a "reasonable fit" between the asserted goal and the means chosen to accomplish it. *Cincinnati v. Discovery Network*, 507 U.S. 410, 416-417 (1993) (holding that the city did not establish a reasonable fit between safety and aesthetics and a selective ban on news racks containing commercial publications). The *Krantz* court concluded that despite citizen complaints about leaflets left on cars and the fact that the ordinances were enacted to prevent littering, the cities had not established a sufficient basis for "concluding that a cause-and-effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." *Krantz*, 160 F.3d at 1222. Thus, although the government need not choose the least restrictive means of regulation, it may not curtail substantially more speech than is necessary to accomplish its goal. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The Eighth Circuit deemed the *Krantz* ordinances to violate this well-established constitutional standard. *See also City of Akron v. Molyneaux*, 760 N.E.2d 461, 467 (Ohio App. 2001) (following *Krantz*); *Deida v. City of Milwaukee*, 176 F.Supp.2d 859, 870 (E.D. Wis. 2001) (citing *Krantz* approvingly).

The *Krantz* court also found *Schneider v. New Jersey*, 308 U.S. 147 (1939), helpful in its analysis (although not directly on point). *See Krantz*, 160 F.3d at 1219. In *Schneider*, this Court held that the governmental interest in

preventing litter was insufficient to justify an ordinance prohibiting individuals from handing out literature door-to-door. *See Schneider*, 308 U.S. at 163 ("The public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution").

Schneider further noted that a city has the power to punish individuals who throw leaflets on the ground, as opposed to those who distribute leaflets. *Id.*, 308 U.S. at 151. *See also Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72 (1983) ("The 'journey from mailbox to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned'") (citations omitted).

Both the *Krantz* ordinances and the Catlettsburg Ordinance generally ban the placement of leaflets on cars, with the limited exception in *Krantz* where a vehicle occupant willingly accepts the leaflet, and in Catlettsburg where the leafleter owns the car or has written consent of the owner to affix a leaflet. The *Krantz* ordinance did not survive judicial scrutiny despite its exception because the ordinance generally assumed that people do not wish to receive leaflets on their cars and that there is no audience interested in the information. *Id.*, 160 F.3d at 1222. The Eighth Circuit deemed these presumptions unconstitutional under *Martin v. City of Struthers*, 319 U.S. 141, 143-44 (1943).

Catlettsburg's Ordinance makes the same presumptions. Catlettsburg punishes the leafleter who deposits a leaflet without written consent even though, despite the absence of consent, the recipient is willing to receive the information. *See Martin*, 319 U.S. at 143 (free speech

"embraces the right to distribute literature . . . and necessarily protects the right to receive it") (internal citation omitted). Indeed, in Catlettsburg, oral consent will not suffice.

The Sixth Circuit candidly acknowledged the conflict between its *Jobe* decision and *Krantz*. *See Jobe*, 409 F.3d at 273 [App. 23-24] (deeming minor differences to "not provide a basis for distinguishing the one case from the other," and concluding that " . . . this case likely would have come out differently had we followed *Krantz*). But the court gave three reasons for rejecting *Krantz*: (1) it deemed the placement of "unrequested fliers on a car windshield" to be littering – and thus found complete congruence between the ban on car leaflets and the governmental interest in preventing littering; (2) it deemed *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), which upheld a ban on affixing flyers and posters to public utility poles, to likewise allow a ban on "the unauthorized use of private property to distribute or display a message . . . "; and (3) it thought that *Krantz* failed to account for the "fundamental difference between traditional leafleting and the activities of Jobe and Krantz." *Jobe*, 409 F.3d at 273-74 [App. 24-25].

This Court should grant review to resolve this direct conflict between the Eighth and Sixth Circuits on so fundamental an issue as a speaker's right to deliver leaflets by securely placing them on a car (rather than securely placing them on a front door or in a pedestrian's hand).[1]

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[1] Indeed, the *Jobe* appendix cites similar bans contained in one state statute (New York), one territorial law (Virgin Islands) and 38

(Continued on following page)

II. THE SIXTH CIRCUIT HAS FAILED TO GIVE LEAFLETING THE PROTECTION DEMANDED BY THIS COURT'S PRECEDENTS AND HAS MISAPPLIED *TAXPAYERS FOR VINCENT*.

A. This Court Has Shown Special Concern For Cheap And Convenient Forms Of Communication, Including Leafleting, Because They Promote Speech By Those Who Could Not Otherwise Afford To Communicate.

For more than sixty years, this Court has vigilantly protected the First Amendment rights of leafleters and others who rely on "cheap and convenient" forms of communication. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). The Court has "shown special solicitude" for inexpensive modes of communication that are available to almost all. *Taxpayers for Vincent*, 466 U.S. at 813 n.30.

In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), this Court struck down an ordinance forbidding the distribution of "circulars, handbooks, advertising and other literature" without a permit. *Id.*, 303 U.S. at 447. The Court deemed the ordinance facially invalid, *id.*, 303 U.S. at 451, despite arguments about litter and sanitation. *See id.*, 303 U.S. at 444 (syllabus summary of counsel's argument).

The next year, the Court struck down four ordinances banning leafleting on city streets and sidewalks. *Schneider v. New Jersey*, 308 U.S. 147 (1939). It deemed the governments' interest in preventing litter "insufficient to justify an ordinance which prohibits a person rightfully on a

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municipal ordinances. A decision by this Court thus would have an effect well beyond the specific Ordinance at issue here. *See Jobe*, 409 F.3d at 274-79.

public street from handing literature to one willing to receive it." *Id.*, 308 U.S. at 162. Nor did one ordinance survive by limiting its reach to streets and alleys, because "the streets are natural and proper places for the dissemination of information and opinion." *Id.*, 308 U.S. at 163.[2]

In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court struck down a ban on door-to-door distribution of literature (as applied to religious literature), deeming it "essential to the poorly financed causes of little people." *Id.* 319 U.S. at 146. Although such distribution "may be either a nuisance or a blind for criminal activities," it also may promote "dissemination of ideas in accordance with the tradition of free discussion." *Id.*, 319 U.S. at 145 (citing *Schneider*, 308 U.S. at 164 ("[p]amphlets have proved most effective instruments in the dissemination of opinion")).

In 1983, the Court struck down limits on picketing and leafleting on the sidewalks surrounding the Supreme Court building itself. *United States v. Grace*, 461 U.S. 171 (1983). While the Court did "not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds," it questioned whether limits on activities "on the public sidewalks substantially serv[e] these purposes." *Id.*, 461 U.S. at 182.

And most recently, in *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), this Court struck down a permit requirement for

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[2] The Los Angeles ordinance at issue prohibited leafleting to pedestrians and mass transit users, or by "plac[ing] or attach[ing] any hand-bill in, to, or upon any automobile or vehicle." *Schneider*, 308 U.S. at 153.

door-to-door canvassers. In so doing, the Court noted that the cases invalidating, "over 50 years," various "restrictions on door-to-door canvassing and pamphleteering," *id.*, 536 U.S. at 160, "emphasize the value of the speech involved." *Id.*, 536 U.S. at 161. The cases also "discuss . . . the historical importance of . . . canvassing and pamphleteering as vehicles for the dissemination of ideas." *Id.*, 536 U.S. at 162 (citing *Schneider*, 308 U.S. 147). Those free speech interests trumped the government's interests in preventing fraud, preventing crime and protecting residential privacy. *See id.*, 536 U.S. at 164-65.

City of Ladue, 512 U.S. 43, involved residential signs, not leaflets. But the Court applied similar principles to strike down a ban on residential window signs. *See id.*, 512 U.S. at 55-56 (collecting cases striking down limits on leafleting and related means of expression). It characterized the flaw in such prohibitions, even if content-neutral, as this: "by eliminating a common means of speaking, such measures can suppress too much speech." *Id.*, 512 U.S. at 55. Moreover, the Court stressed that "[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." *Id.*, 512 U.S. at 57.

Modern America is a mobile society; Americans' reliance on cars has spawned expanding suburban and exurban communities. There, as in rural communities, "door to door" leafleting often entails driving, not walking, and a significant time expenditure. Door-to-door leafleting in these communities may be impractical; hand-delivering leaflets to passers-by (who may walk only from home to garage and from parking garage to office) may be haphazard. Given these realities, the placement of leaflets on cars

– which remain accessible when parked on the public streets even when their drivers are not – is no less worthy of First Amendment protection than handing leaflets to pedestrians, or distributing them door-to-door. Indeed, placing a leaflet under a car's wipers intrudes on personal privacy far less than door-to-door solicitation.[3]

Unlike the Eighth Circuit in *Krantz*, the Sixth Circuit declined to extend First Amendment protection to leaflets delivered by securing them under a car's windshield wipers. Applying the traditional time-place-and-manner test to Catlettsburg's content-neutral regulation, the Sixth Circuit deemed the Ordinance to be narrowly tailored, and not overbroad, by equating all "unrequested" leaflets (delivered securely under a car's windshield wipers) with littering. *See Jobe*, 409 F.3d at 269-70 [App. 16-17]. The logical conclusion of this flawed premise is unassailable: an ordinance banning car leaflets (defined as litter) is narrowly tailored to serve the government's interest in preventing litter.

But the Sixth Circuit's premise – that all unrequested leaflets secured under car windshield wipers are litter – has no support in this Court's cases or in logic. It results in barring the distribution of leaflets to willing recipients, solely because they have not expressed *in writing* their willingness to receive the leaflets; in effect, it presumes that those who have not expressed in writing a willingness to receive leaflets are unwilling to receive them. *But see*

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[3] Although involving mostly search and seizure cases, this Court has not afforded citizens the same privacy interests in their cars as in their homes. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (noting common law protection of the home as one's "castle of defence and asylum") (quoting 3 W. Blackstone, Commentaries *288).

Martin, 319 U.S. at 143-44. And – because there is no reason to distinguish between "litter" secured to a windshield wiper and "litter" secured to a front door handle – the Sixth Circuit's premise invites governments to impose criminal sanctions on door-to-door leafleters who (perhaps finding no one at home or respecting a "baby sleeping" sign) secure their pamphlets to front door handles.

To survive scrutiny, Catlettsburg's Ordinance must be narrowly tailored, not overbroad. *E.g.*, *Taxpayers for Vincent*, 466 U.S. at 815. The Sixth Circuit's tautological analysis – car leaflets equal litter; the Ordinance bans car leaflets; the Ordinance thus is narrowly tailored to ban litter – fails to adequately address the Ordinance's true overbreadth: that it criminalizes the distribution of leaflets from a speaker to a willing listener.

In *Village of Stratton*, 536 U.S. at 165-66, this Court invalidated a city ordinance prohibiting "canvassers" from going on private property for the purpose of explaining or promoting any "cause," unless they first received a permit and the residents visited had not posted a "no solicitation" sign. The Court recognized the importance of the city's asserted goals: crime and fraud prevention and the protection of residents' privacy. *See id.* However, the amount of speech covered by the ordinance was too broad and the ordinance was not narrowly tailored to serve the purported interests. *See id.*, 536 U.S. at 166-69. The Court deemed a resident's right to refuse conversation with a canvasser and one's ability to post a "no solicitation" sign ample protection from unwanted visitors. *See id.*, 536 U.S. at 168-69. No such privacy concerns apply here, because car owners are absent at the time of leafleting and, in any event, privacy interests in a home far exceed those in a car.

The City amply serves its litter prevention aims by enacting and enforcing ordinances against those who litter.[4] *See Molyneaux*, 760 N.E.2d at 467 (finding no "factual basis for concluding that a relationship actually exists between the placement of handbills on vehicles . . . and the prevention of litter . . . "). This allows the government to promote and protect the aesthetics of the city without hindering freedom of speech. By opting instead to restrict the distribution of leaflets on parked cars, Cattlettsburg's Ordinance is not narrowly tailored.

Nor does the Ordinance leave open ample alternative channels for communication. Leafleting is a particularly valuable mode of communication because, for many people, it is the most efficient, accessible, and economic way to distribute their information. *See Schneider*, 308 U.S. at 164. This Court has shown "special solicitude" for forms of expression that are much less expensive than feasible alternatives and more accessible to a large number of citizens. *Taxpayers for Vincent*, 466 U.S. at 813 n.30; *see also Martin*, 319 U.S. at 146 ("Door to door distribution of circulars is essential to the poorly financed causes of little people"); *City of Ladue*, 512 U.S. at 48 ("Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or

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[4] The record here does not support a link between leafleting on cars and littering. As the Mayor acknowledged, neither he nor any other City official of whom he is aware has ever received a complaint about leafleting under a car's windshield wipers. *See* Statement of Facts, pp. 2-4, above. The City's interest in preventing litter (which can be furthered by punishing the litterer) cannot support a regulation broad enough to include non-littering within its sweep. *Schneider*, 308 U.S. 147. Simply put, an anti-littering law is unconstitutionally overbroad when it also prohibits leaflets that the recipient welcomes and that do not end up as litter.

limited mobility, a yard or window sign may have no practical substitute").

Here, other forms of leafleting available to Jobe cannot replicate the unique efficiency of leafleting cars downtown. To reach the drivers of those cars while they are in town, he must patrol the Catlettsburg streets, hoping to catch each driver as he or she enters or exits the car – a task entailing far more time and risk of failure. To reach the drivers of those cars while they are at home, Jobe must drive door-to-door throughout a small, rural county – a task again entailing far more time (and gas money). The most efficient and effective way to leaflet those who come to town (residents and visitors) is to leaflet cars that congregate in a finite area. And it is no surprise, then, that the only evidence in the record is Jobe's unrebutted, unchallenged assertion that he finds this means of leafleting to be among the most efficient, cost-effective means of disseminating his message. [R.1: Complaint, ¶ 7.]

The Sixth Circuit's decision simply fails to accord leafleting the degree of constitutional protection demanded by this Court's cases. In so doing, it impermissibly assumes that, absent written consent, car owners are unwilling to listen to Jobe's speech.

B. The Sixth Circuit's Application Of *Taxpayers For Vincent* Is Unprecedented And Unwarranted.

In *Taxpayers for Vincent*, this Court upheld a ban on affixing leaflets or placards to public utility poles. The Sixth Circuit relied heavily on *Taxpayers for Vincent*, reasoning that, if the First Amendment does not protect

placing leaflets on public property just because it is located on public streets, it surely does not protect placing leaflets on private property just because it likewise is located on public streets. *See Jobe*, 409 F.3d at 269-71 [App. 16-17].

But the Sixth Circuit failed to distinguish between markedly different uses of property. The utility pole in *Taxpayers for Vincent* was intended as a platform for speech directed to the public; in that way, it was like a billboard, or car bumper sticker or yard sign. But the cars at issue here are merely the delivery device for speech directed only to the car's driver; in that way, they are like private mailboxes or front door handles.

The distinction is critical. Jobe does not claim a right to affix bumper stickers to other people's cars, any more so than he could place political signs in their front yards (or placards on utility poles). But his use of windshield wipers to deliver his message to the property owner is properly analogous to the private mailbox or front door handle, not the front yard or utility pole.

Petitioner has found no case applying *Taxpayers for Vincent* as the Sixth Circuit did here. While this Court has cited *Taxpayers for Vincent* in various factual settings, all involved the use of a particular platform for speech to the public, not a delivery device for speech directed to one person.[5] *See, e.g., Clark v. Community for Creative Non-violence*, 468 U.S. 288 (1984) (rejecting a claimed right to

[5] *Frisby v. Schultz*, 487 U.S. 474 (1988), involved speech directed to one house from the public street. But that case involved the unique harms inherent in targeted picketing of a particular home, where "the resident . . . is left with no ready means of avoiding the unwanted speech." *Id.*, 487 U.S. at 487.

sleep in a public park during an ongoing demonstration); *City of Ladue*, 512 U.S. 43 (1994) (striking down ban on residential signs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down restrictions on tobacco advertising).

Likewise, the circuit court cases citing *Taxpayers for Vincent* usually involve restrictions on placing signs or literature on public and private property for public view. *See, e.g., Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005) (billboards); *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998) (picket signs on public street); *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, 100 F.3d 175 (1st Cir. 1996) (newspaper distribution boxes on public street); *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992) (off-premises signs); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985) (off-premises signs); *N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984) (parades on public streets). No circuit court case appears to recruit *Taxpayers for Vincent* to support a prohibition on the *means* of delivering speech to a specific listener.

The Sixth Circuit's application of *Taxpayers for Vincent* is unprecedented and erroneous.

CONCLUSION

For all these reasons, Petitioner Leonard F. Jobe respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0207p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEONARD F. JOBE, *Plaintiff-Appellant,* *v.* CITY OF CATLETTSBURG, *Defendant-Appellee.*	No. 04-5222

Appeal from the United States District Court
for the Eastern District of Kentucky at Ashland
No. 02-00129 – Henry R. Wilhoit, Jr., District Judge.

Argued: February 2, 2005

Decided and Filed: May 6, 2005

Before: NELSON and SUTTON, Circuit Judges;
WELLS, District Judge.*

COUNSEL

ARGUED: David A. Friedman, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, for Appellant. Matthew J. Wixsom, Ashland, Kentucky, for Appellee.

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* The Honorable Lesley Wells, United States District Judge for the Northern District of Ohio, sitting by designation.

ON BRIEF: David A. Friedman, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, Edward E. Dove, DOVE LAW OFFICE, Lexington, Kentucky, for Appellant. Matthew J. Wixsom, Ashland, Kentucky, for Appellee.

OPINION

SUTTON, Circuit Judge. May a city, consistent with the First and Fourteenth Amendments, prohibit individuals from placing leaflets on car windshields and other parts of a vehicle without the consent of the owner? Because the law represents a content-neutral restriction on the time, place and manner of speech, because the law narrowly regulates the problems at hand (littering, visual blight and unauthorized use of private property), because the law leaves open ample alternative avenues for distributing leaflets in an inexpensive manner (face-to-face on a public street and door-to-door in a neighborhood) and because the law has much in common with a ban on placing signs on utility poles, *see Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), we conclude that it may.

I.

The City of Catlettsburg lies in northeastern Kentucky at the confluence of the Ohio and Big Sandy rivers, where the borders of Kentucky, Ohio and West Virginia all converge. The city has a population of about 1,900.

In 1952, the city council of Catlettsburg enacted the following ordinance:

§ 113.05 Placing Posters on Vehicles

It shall be unlawful for any person to place or deposit or in any manner to affix or cause to be placed or deposited or affixed to any automobile or other vehicle or other automotive vehicle, any handbill, sign, poster, advertisement, or notice of any kind whatsoever, unless he be the owner thereof, or without first having secured in writing the consent of the owner thereof.

Penalty, see § 113.99

Catlettsburg, Ky., City Ordinances, § 113.05. The ordinance thus prohibits individuals from doing two different things – "plac[ing]" a handbill on a car (e.g., under the windshield wipers) or "affix[ing]" a poster or other advertisement to the car. Individuals who violate the section may be fined "not more than $500." *See* § 113.99.

The ordinance does not stand alone in the city's code. In a neighboring law, entitled "Scattering, Littering Prohibited," the city forbids throwing, scattering, or distributing any poster or pamphlet upon any public place (including sidewalks and streets), upon "any private lot or steps," or "into or upon . . . any vehicle." *See* § 113.03. At the same time, the city expressly permits the distribution of written materials to private residences if the literature "is handed in at the door, or placed on a porch, or securely fastened to prevent it from being blown or scattered about," *id.*, and the city does not prohibit individuals from handing out leaflets on streets, sidewalks or other public places.

The current mayor of Catlettsburg does not know why the city first promulgated the vehicle-handbill ordinance over a half-century ago. As for the present-day relevance of the ordinance, the mayor has explained that

the municipality has a general littering problem that this ordinance (along with other ordinances) helps to address.

Leonard Jobe lives in Catlettsburg and is the head of the local American Legion post. In 2002, Jobe, with no apparent knowledge of the law, began distributing leaflets on behalf of the American Legion by placing them under the windshield wipers of cars parked on public property. In response, the city enforced the ordinance against him by fining Jobe $500. Jobe has paid the fine and does not challenge its imposition here. As far as the mayor can recall (based on his employment with the city since 1991), Jobe was the first person against whom the city has enforced the ordinance. To the mayor's knowledge, no one had complained about leafletters violating the ordinance before Jobe's violation and no one has complained about leafletting of this sort since then.

Invoking his First (and Fourteenth) Amendment right to freedom of speech, Jobe filed a three-page declaratory-judgment action against the city, seeking a declaration that the ordinance was unconstitutional, an injunction against the ordinance as applied to future leafletting by him and an award of costs and attorney's fees. On cross motions for summary judgment and after minimal discovery initiated by the parties, the district court upheld the ordinance as a valid content-neutral time, place and manner restriction that did not foreclose other means of effective communication. We review the district court's grant of summary judgment de novo. *CSX Transp., Inc. v. United Transp. Union*, 395 F.3d 365, 368 (6th Cir. 2005).

II.

A.

In its traditional form, leafletting occurs when individuals offer handbills, pamphlets, tracts, advertisements, notices and other information to individuals on the street or sidewalk who remain free to accept or reject the document. *Taxpayers for Vincent*, 466 U.S. at 809-10 ("The [leafletting] right recognized in *Schneider* [*v. New Jersey*, 308 U.S. 147 (1939),] is to tender the written material to the passerby who may reject it or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground."). It is a venerable and inexpensive method of communication that has permitted citizens to spread political, religious and commercial messages throughout American history, starting with the half a million copies of Thomas Paine's *Common Sense* that fomented the American Revolution. *See Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (noting that "pamphlets and leaflets . . . have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest"); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) ("The hand distribution of religious tracts is an age-old form of missionary evangelism – as old as the history of printing presses."). *See also Watchtower Bible & Tract Soc'y of New York v. Vill. of Stratton*, 536 U.S. 150, 153 (2002) (religious speech); *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (political speech); *Breard v. Alexandria*, 341 U.S. 622, 624 (1951) (commercial speech); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993) (commercial speech).

In each of these settings, the Supreme Court has made it clear that leafletting and related activities represent a

method of speech protected by the First and Fourteenth Amendments. The Court has invalidated bans on leafletting on public streets. *See, e.g., United States v. Grace*, 461 U.S. 171, 183-84 (1983) (striking statute forbidding leafletting on the sidewalks surrounding the Supreme Court); *Jamison v. Texas*, 318 U.S. 413, 414 (1943) (striking ordinance forbidding leafletting on public streets); *Schneider*, 308 U.S. at 162-63 (striking ordinances forbidding leafletting on public streets). It has invalidated bans on door-to-door leafletting, where individuals offer the homeowner informational tracts at the same time that they try to engage the homeowner about the religious, political or commercial message they wish to convey. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (striking ordinance that forbade ringing a doorbell or otherwise summoning a resident to the door to receive handbills); *Schneider*, 308 U.S. at 165 (striking ordinance that forbade door-to-door leafletting). And it has invalidated licensing requirements for door-to-door solicitors and leafletters. *See Watchtower Bible & Tract Soc'y of New York*, 536 U.S. at 168 (striking ordinance prohibiting canvassers from going door-to-door among residences without a permit because it was "not tailored to the Village's stated interests"); *Lovell*, 303 U.S. at 451 (striking ordinance prohibiting "the distribution of literature of any kind at any time, at any place, and in any manner without a permit").

At the same time that the Court has invalidated bans on leafletting and unyielding licensing requirements for leafletting, it has indicated that the reserved police powers of the States (and cities) permit them to impose reasonable time, place and manner restrictions on leafletting. *See Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding ban on leafletting in front of a targeted residence); *Heffron v.*

Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654-55 (1981) (upholding regulation restricting leafletting at a state fair to assigned booths); *Hill*, 530 U.S. at 723 (upholding regulation prohibiting leafletters within 100 feet of a health care facility from knowingly coming within eight feet of another person without first receiving that person's consent); *cf. Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 380 (1997) (upholding injunction creating fixed buffer zones that prevented leafletters and protestors from approaching within 15 feet of health clinic doorways).

The Court also has addressed similar free-speech issues in the context of government regulations of signs. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513-15 (1981), the Court invalidated a city ordinance that placed substantial restrictions on billboards within the city because the restrictions were content-based. In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court invalidated an ordinance that prohibited "homeowners from displaying any signs on their property except 'residence identification' signs, 'for sale' signs, and signs warning of safety hazards," *id.* at 45, because the ordinance "almost completely foreclosed a venerable means of communication that is both unique and important," *id.* at 54. And in *Taxpayers for Vincent*, the Court upheld a Los Angeles ordinance that banned posting signs on publicly owned utility poles because the ordinance "responds precisely to the substantive problem which legitimately concerns the City" while "curtail[ing] no more speech than [was] necessary to accomplish its purpose." 466 U.S. at 810. In each of these settings, the Court has explained that the right to distribute literature protects both the interests of speakers in sharing information and the interests of citizens in receiving it. *See Martin*, 319 U.S. at

146-47 ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."); *id.* at 143 (explaining that the freedom of speech "necessarily protects the right to receive [literature]" and considering "the right of the individual householder to determine whether he is willing to receive" a leafletter's message); *see also Gilleo*, 512 U.S. at 56; *Taxpayers for Vincent*, 466 U.S. at 812 n.30; *Schneider*, 308 U.S. at 164.

Through it all, however, the Court has not considered the validity of a regulation restricting individuals from placing leaflets on car windshields or otherwise affixing notices on cars. That is surprising given the many cities that have similar ordinances. As readers outside of Cattlettsburg may wish to know, one State (New York) and numerous American cities have adopted equivalent ordinances, including many large cities (Atlanta, Philadelphia), several mid-sized cities (Charlotte, Portland (Oregon), San Antonio) and some small cities (Albany (Georgia), Mundelein (Illinois), Mishawaka (Indiana)). *See* Appendix (listing similar ordinances from one State, from one territory and from 38 cities located in 19 other States). One of the four statutes at issue in *Schneider* (the Los Angeles statute), it is true, forbade "attach[ing] any handbill in, to or upon any automobile or other vehicle." 308 U.S. at 154. But the Court never mentioned the provision in its analysis and, after addressing Clara Schneider's as-applied challenge to her conviction under a New Jersey licensing requirement for door-to-door advocacy, reversed the conviction of another appellant charged under the Los Angeles ordinance for distributing handbills on a sidewalk

without giving any indication that his challenge was not an as-applied challenge as well. *See id.* at 165 ("We do hold, however, that the ordinance in question, *as applied to the petitioner's conduct*, is void, and she cannot be punished for acting without a permit. The judgment in each case is reversed and the causes are remanded for further proceedings not inconsistent with this opinion.") (emphasis added).

B.

In the face of these precedents and this history, both parties agree that the First Amendment generally protects leafletting in its various forms and manifestations. And they agree that the Catlettsburg ordinance is a content- and viewpoint-neutral regulation of leafletting, and thus does not warrant exacting scrutiny on that basis alone. But they part company over whether Jobe's leafletting occurred in a public forum – with Jobe emphasizing that his leafletting occurred on cars parked on public streets and the city emphasizing that his leafletting occurred on privately owned cars.

The public-forum doctrine recognizes "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). The traditional public forum consists of "government property that has traditionally been available for public expression," such as public streets and parks. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius*, 473 U.S. at 802. The designated public forum consists of public property "that the State has opened for expressive activity by part

or all of the public." *Lee*, 505 U.S. at 678. "[A]ll remaining public property" falls into the third category, the nonpublic forum. *Id.* at 678-79. With respect to a traditional public forum and a designated public forum, "the government may not prohibit all communicative activity," may only enforce content-based restrictions when it shows "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" and "may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *id.* at 46. Regulations concerning nonpublic fora, however, face less daunting scrutiny: They "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Lee*, 505 U.S. at 679.

Not every regulation that affects public property, however, implicates the public-forum doctrine. In *Taxpayers for Vincent,* supporters of a political candidate challenged a Los Angeles ordinance that prohibited them from placing cardboard signs on utility poles and crosswires supporting utility poles. 466 U.S. at 792-93. In addressing their as-applied challenge to the law, *id.* at 803, the Court observed "that 'the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.'" *Id.* at 814 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). It then reasoned that the supporters' "reliance on the public forum doctrine [was] misplaced" because they had "fail[ed] to demonstrate the existence of a traditional right of access respecting such

items as utility poles for purposes of their communication comparable to that recognized for public streets and parks." *Id.* at 814. Even though the utility poles were "publicly owned objects," *id.* at 801, and even though they were situated along public streets and on public sidewalks, the Court concluded that the utility poles were not public fora and that the law was "certainly constitutional," *id.* at 815.

Similar reasoning defeats Jobe's argument. If the public-forum doctrine does not apply to *public* items (e.g., utility poles) *permanently* located on public streets and sidewalks, it assuredly does not apply to *private* cars *temporarily* parked on public streets. And if *Taxpayers for Vincent* was wary about permitting citizens to co-opt utility poles to serve as bulletin boards and signposts, one would expect the Court to be equally wary, if not more wary, of permitting citizens to co-opt privately owned cars to serve as receptacles for the distribution or display of literature and other information. *See id.* at 815 n.31 (noting that "appellees could not seriously claim the right to attach 'Taxpayer for Vincent' bumper stickers to city-owned automobiles" and reiterating that "the State, '*no less than a private owner of property*, has power to preserve the property under its control for the use to which it is lawfully dedicated'") (emphasis added). In neither of these settings, whether the utility pole or the car, does the ostensible public forum deal with a method of communication for which one can say there has been a "traditional right of access" and in neither instance does it offer an apt analogy to the forms of communication that have long taken place on our "public streets and parks." *Id.* at 814. *See also Council of Greenburgh*, 453 U.S. at 128-30 (concluding that letterboxes for mail were not public fora and

rejecting claim of First Amendment right to place leaflets in letterboxes without paying postage); *id.* at 131 ("[I]t is a giant leap from the traditional 'soapbox' to the letter-box designated as an authorized depository of the United States mails, and we do not believe the First Amendment requires us to make that leap."). In the final analysis, Jobe is mistaken in claiming that the city has regulated a public forum.

C.

Once *Taxpayers for Vincent* had concluded that the ordinance at issue did not regulate a public forum, it proceeded to apply the traditional time-place-and-manner test to the regulation. 466 U.S. at 808, 815. Following the Court's lead, we will do the same. While one could argue that the protection of private property rights here calls for a lower standard of review, *see id.* at 811 (noting that in *Metromedia* "the private citizen's interest in controlling the use of his own property justifie[d]" treating differently signs on private versus public property), that argument has not been made.

To qualify as a reasonable time-place-and-manner regulation of speech, the law must (1) be content-neutral, (2) serve a significant government interest, (3) be narrowly tailored to serve that government interest and (4) leave open ample alternative channels of communication. *Id.* at 808, 815; *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 818 (6th Cir. 2005); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 751-52 (6th Cir. 2004). Under the third requirement, as the Supreme Court has "emphasized on more than one occasion, when a content-neutral regulation does not entirely

foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726. "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (quotations omitted); *Prime Media*, 398 F.3d at 819.

Catlettsburg's ordinance survives this test. *First*, the parties correctly agree that the ordinance is content-neutral and viewpoint-neutral as well. The law does not draw distinctions based on the topic of speech at issue or the point of view of the speaker. And the explanations for passing the law have nothing to do with the content of the literature being distributed by the speaker. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Second, the ordinance advances two significant government interests: (1) It furthers the government's interest in prohibiting litter and visual blight; and (2) it furthers individuals' interests in having their private property left alone by those who do not have permission to use it. Curbing littering and the visual blight that comes with it advances the city's "weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Taxpayers for Vincent*, 466 U.S. at 806; *see also Metromedia*, 453 U.S. at 507-08 (four-justice plurality) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals. It is far too late to contend otherwise."); *id.* at 552 (Stevens, J., dissenting in part) (stating that the interests "in maintaining pleasant surroundings and

enhancing property values . . . are equally legitimate and substantial in all parts of the city"); *id.* at 560 (Burger, C.J., dissenting) ("The plurality acknowledges – as they must – that promoting traffic safety and preserving scenic beauty 'are substantial government goals.'"); *id.* at 570 (Rehnquist, J., dissenting) ("In my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community."). Allowing individuals to decide for themselves how, when or whether their private property is used either for a public advertisement (e.g., the affixing of a poster on a car) or as a container for an advertisement (e.g., placing a leaflet under the car windshield wipers) is a legitimate, if not compelling, government interest. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) ("[T]he Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected."); *id.* at 567 ("It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.").

Nor does Catlettsburg stand alone in seeking to advance these government interests. That at least one State (New York) and at least 38 other cities – from Philadelphia and Atlanta to San Antonio and Portland (Oregon) to Mishawaka (Indiana) and Albany (Georgia) – have passed similar laws suggests that the policy behind them is premised on legitimate rather than contrived police-power concerns. *See* Appendix. In view of the common-sense explanations for these types of laws, they do not invariably require proof that the problem has occurred in

the past (a daunting task in view of the 1952 vintage of this law and the understandable absence of information about why the law was passed) or an elaborate study of their present-day necessity (an equally daunting task in view of the difficulty of showing the empirical necessity for a law that has been in place for more than 50 years). While governments normally should be expected to weigh the costs and benefits of regulating methods of speech as well as the alternative to regulating speech at all before enacting such laws, *Prime Media*, 398 F.3d at 823, it hardly amounts to speculation to conclude that the First Amendment costs of this law are quite modest (given the inexpensive alternatives available for distributing literature or advertisements) and the police-power benefits of the law are quite legitimate (given the private-property and aesthetic interests advanced by the law).

Nor, at any rate, has Jobe presented "any reason to question the city's theory" that a ban on placing advertisements and posters on cars will further the city's interest in preventing littering on private property and in preventing the use of private property for purposes neither intended nor welcomed by the owner. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437-40 (2002). *See also Metromedia*, 453 U.S. at 510 (plurality) ("It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'"); *Taxpayers for Vincent*, 466 U.S. at 816-17 ("[W]e accept the City's position that it may decide that the esthetic interest in avoiding 'visual clutter' justifies a removal of signs creating or increasing that clutter."); *Prime Media*, 398 F.3d at 824 (rejecting the contention that a city should have to justify specific dimensional restrictions on billboards "because any further explanation assuredly

would contain the kind of aesthetic and subjective judgment that judges are not well-equipped to second guess").

Third, the ordinance advances these interests in a narrow and constitutionally permissible way. As in *Taxpayers for Vincent*, where Los Angeles banned "the posting of signs on public property," 466 U.S. at 791, "the substantive evil" at issue – visual blight there, littering on private property here –

> is not merely a possible by-product of the activity, but is created by the medium of expression itself. In contrast to *Schneider*, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Id. at 810. "By banning these signs," the Court concluded, "the City did no more than eliminate the exact source of the evil it sought to remedy." *Id.* at 808.

So it is true here. Catlettsburg targeted the precise problems – littering on private automobiles and unauthorized use of private property – that it wished to correct. If a city may ban signs from utility poles due to the visual blight caused by them, it follows that a city may ban the placement of leaflets and signs on privately owned cars. For the Catlettsburg law not only corrects the visual blight stemming from all manner of unrequested advertisements being placed on cars, it also prevents littering on private property (e.g., on the privately owned cars), prevents littering on public property (when wind, rain or the inadequacy of a windshield wiper as a receptacle for information causes the leaflets to fall to the ground) and prevents private property

from being co-opted for uses that the owner neither intended nor welcomed.

Fourth, the ordinance leaves open ample alternative channels of communication. Placed in the context of other municipal laws enacted by the city, the ordinance permits a wide range of leafletting activities. Catlettsburg does not prohibit leafletting in its most traditional sense – offering handbills to pedestrians and giving them the choice to take the handbill or leave it. *See Taxpayers for Vincent*, 466 U.S. at 809-10 ("The [leafletting] right recognized in *Schneider* is to tender the written material to the passerby who may reject it or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground."). It does not prohibit citizens from exercising their right "to distribute literature in the same place" where the ban on placing leaflets on car windshields exists – namely, by waiting in a parking lot or on a street and asking the owners of a car whether they would like a leaflet or a sign for their car. *Id.* at 812 (The "ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited."). It does not prohibit citizens from going door-to-door to talk to residents about the message they wish to share and expressly permits them to give homeowners a pamphlet if they are "handed in at the door." § 113.03. It does not prohibit citizens from mailing information to residents. *See Council of Greenburgh*, 453 U.S. at 114. And it expressly allows citizens to leave leaflets and pamphlets at private residences if they are "placed on a porch[ ] or securely fastened to prevent [them] from being blown or scattered about." § 113.03. By any measure of alternative channels of communication, the

City of Catlettsburg has given its citizens numerous ways to distribute literature and information in an inexpensive, efficient and productive manner.

III.

Jobe attempts to counter these conclusions with a series of additional arguments that we have not yet fully accounted for or otherwise addressed in our affirmative presentation. He initially protests that Catlettsburg should control littering by punishing "those who actually throw papers on the streets" rather than those who distribute the leaflets. *Schneider*, 308 U.S. at 162. Unlike *Schneider*, however, littering and visual blight are not the only concerns that support this ordinance. The law also protects the private property of the city's residents and prohibits their cars from being converted into mailboxes or bulletin boards. Placing unrequested leaflets on privately owned cars, moreover, amounts to a form of littering no less than placing leaflets on privately owned lawns or directly on the public streets. There is nothing special about a car – or, for that matter, about a bicycle, a baby stroller, an individual's back or a lawn – that invites others to place leaflets or advertisements on it without the owner's consent. And although the "short, though regular, journey from mail box to trash can ... is an acceptable burden," to place on mailbox owners, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (striking a content-based statute prohibiting mailing unsolicited advertisements for contraceptives), that burden stems from an individual's choice to erect a mail box, *see Council of Greenburgh*, 453 U.S. at 125 ("Anyone is free to live in any part of the country without having letters or packages delivered or received by the Postal Service by simply failing to provide

the receptacle for those letters and packages which the statutes and regulations require."). In marked contrast, parking a car on a public street is not an invitation to place literature on the car or, worse, to become a vehicular sandwich board for another citizen's message of the day.

Neither is it clear that Jobe's conduct may fairly be described as leafletting, as opposed to littering, at least so far as the Supreme Court has described leafletting. "The right recognized in *Schneider*," the Court has explained, "is *to tender* the written material to the passerby *who may reject it or accept it.*" *Taxpayers for Vincent*, 466 U.S. at 809-10 (emphasis added). Unlike traditional leafletting, the recipient of an advertisement or other pamphlet on a car windshield has no choice in receiving the literature, no choice in accepting the burden of disposing of it and no choice in peeling it off the windshield after a rain shower. *See Schneider*, 308 U.S. at 162 (discussing "handing literature to one willing to receive it"); *see also Hill*, 530 U.S. at 727 ("And, as in all leafleting situations, pedestrians continue to be free to decline the tender."); *id.* at 718 ("[O]ur cases have repeatedly recognized the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.") (quotations omitted); *Taxpayers for Vincent*, 466 U.S. at 806 n.24 (noting that "the passer-by who may be offered a pamphlet in the street [] *cannot be made to take it*") (emphasis added); *Watchtower Bible & Tract Soc'y of New York*, 536 U.S. at 168 (noting that "the resident's *unquestioned right to refuse* to engage in conversation with unwelcome visitors[] provides ample protection for the unwilling listener") (emphasis added).

Jobe next argues that the ordinance is not narrowly tailored because (1) it fails to account for drivers who want

to receive leaflets and (2) it permits drivers to give only written consent, as opposed to oral consent, to receive leaflets. Yet the ordinance does account for willing car owners: It permits leafletting on the cars of those who give the leafletter permission. § 113.05 (permitting anyone to place leaflets on a vehicle after "having secured in writing the consent of the owner"). Nothing in the ordinance prohibits willing recipients from indicating in writing to Jobe or other passersby that they invite leaflets to be placed under the windshield wipers of their cars. The ordinance simply accounts for what has long been a central feature of traditional leafletting – the opportunity of the recipient to either accept or reject the offered literature – an opportunity denied to car owners who have not invited the leaflets. *See Taxpayers for Vincent*, 466 U.S. at 809-10. Nor, as a practical reality, is it apparent how the city has needlessly burdened free expression by requiring vehicle owners to give *written* authorization to receive leaflets and advertisements on their cars. Any car owner who would otherwise be available to give *oral* permission to receive, say, leaflets placed under a windshield wiper would otherwise be available to accept the leaflet directly.

Far from improperly interfering with private property, Jobe next argues that his method of distributing American Legion literature and advertisements parallels other age-old methods of distributing information through the private property of others – using a door slot or a door knob to deliver a leaflet to a homeowner, using an answering machine to deliver a voice message, using a private mailbox to deliver a stamped advertisement or using a computer to deliver an electronic message. In attempting to analogize his actions to these methods of communication, however, he neglects a salient distinction: A windshield wiper is not a

communications device and has never taken on the trappings of one. While Mary Anderson may be given credit for inventing the windshield wiper, she has never been given credit for devising a means of communication. And when Robert Kearns sought to improve the device (by inventing the intermittent windshield wiper), *see Kearns v. Wood Motors, Inc.*, 773 F.Supp. 979 (E.D. Mich. 1990), we suspect that he gave little thought to enhancing its ability to accept and secure leaflets. Unlike a telephone, a mailbox, a computer or the well-trodden path to the front door, the windshield wiper does not exist, formally or informally, to encourage communication. *Compare Breard*, 341 U.S. at 626 ("It is true that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers."). In the setting of property that has a tradition of being used to receive and initiate communications, it may make abundant sense under the First Amendment to place the burden on the property owner to remove the slot on the door, to remove the mailbox, *see Greenburgh*, 453 U.S. at 125, to sign onto a do-not-call or a do-not-spam list, or to place a "No Solicitation" sign on the door. It would make considerably less sense to put the vehicle owner to the choice of accepting either a ridiculous requirement (removing the windshield wipers) or an unorthodox burden (placing a "No Handbills, No Posters . . . " sign on the dashboard).

Even so, Jobe counters, the ordinance does not leave open ample alternative channels because "the unique efficiency of leafletting cars downtown cannot be replicated [] by driving door to door throughout a rural county, by hand-delivering to people as they walk by, or by leafleting drivers." Jobe Br. at 6. "To the contrary," he continues,

"the only efficient and effective way to leaflet those who come to town (residents and visitors) is to leaflet cars that congregate in a finite area." *Id.* Jobe has a fair point here because the Supreme Court in fact has been quite sensitive to the need to permit inexpensive methods of spreading ideas and information. *See Gilleo*, 512 U.S. at 57 (striking ordinance that prevented homeowners from displaying signs in their own windows and commenting that "[r]esidential signs are an unusually cheap and convenient form of communication"); *Martin*, 319 U.S. at 146 ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); *Watchtower Bible & Tract Soc'y of New York*, 536 U.S. at 162 ("[P]erhaps the most effective way of bringing [pamphlets] to the notice of individuals is their distribution at the homes of the people.") (quoting *Schneider*, 308 U.S. at 164).

But "[a]lthough the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry, this solicitude has practical boundaries." *Taxpayers for Vincent*, 466 U.S. at 812 n.30 (citations omitted). "That more people may be more easily and cheaply reached by sound trucks," the Court has noted, "is not enough to call forth constitutional protection for what those charged with public welfare may reasonably think is a nuisance when easy means of publicity are open." *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949); *see also Taxpayers for Vincent*, 466 U.S. at 812 n.30 (citing *Metromedia*, 453 U.S. at 549-50 (Stevens, J., dissenting in part), for the proposition that a "ban on graffiti [was] constitutionally permissible even though some creators of graffiti may have no equally effective alternative means of public expression"). Likewise, even though the appellees in

Council of Greenburgh claimed that "receptacles for mailable matter are so superior to alternative efforts to communicate printed matter that all other alternatives for deposit of such matter are inadequate substitutes for postal letterboxes," 453 U.S. at 124, the Court determined that mailboxes were not public fora and so permitted the ban. In the end, the fact that a means of communication is efficient and inexpensive does not automatically trump other government interests. At some point, the very cheapness of a mode of communication may lead to its abuse. As the Court explained in *Taxpayers fr. Vincent*: "A distributor of leaflets has no right simply to scatter his pamphlets in the air – or to toss large quantities of paper from the window of a tall building or a low flying airplane. Characterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance." 466 U.S. at 809.

Jobe, finally, argues that we should follow the Eighth Circuit's lead in *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir.1998), which invalidated a similar ordinance. We decline to do so. As an initial matter, we must acknowledge that this case likely would have come out differently had we followed *Krantz*. While the ordinance at issue in that case did not prohibit individuals from attaching or affixing posters and advertisements to cars, as the Catlettsburg ordinance does, it did prohibit individuals from placing the literature on a car (e.g., under the car windshield wipers), just as the Catlettsburg ordinance does. And while the ordinance at issue in *Krantz* involved the distribution of religious literature, the scant record in this case permits the inference (which Jobe claims to be accurate) that his distribution of fliers on behalf of the American Legion will involve commercial and political

speech. *See* JA 6. So even on the assumption that a different analysis would apply if Jobe's activities involved only commercial speech, an assumption that we do not necessarily accept, *see Discovery Network*, 507 U.S. at 424 (striking ordinance that banned the placement on public streets of newsracks containing commercial, but not non-commercial, handbills), the subject matter of the speech at issue does not provide a basis for distinguishing the one case from the other.

At the end of the day, we disagree with three facets of the *Krantz* analysis. One, even though the *Krantz* district court stated that "these ordinances regulate the conduct of littering – the physical act of throwing down or depositing a piece of paper on public or private property," *Krantz*, 160 F.3d at 1216 (quoting the district court), the Eighth Circuit chose to decide the case on the assumption (never explained) that the placing of handbills on cars is not littering. *Id.* at 1221. We cannot accept that premise. Placing unrequested fliers on a car windshield (or some other part of the car) shares as many qualities with littering as placing the fliers on the front lawn of a residence, on the top of a boat or for that matter on top of any piece of private property that is not otherwise designed by intent or usage to receive and hold literature distributed by others.

Two, so far as the opinion shows, *Krantz* did not address *Taxpayers for Vincent*, much less distinguish the decision. That perhaps explains the Eighth Circuit's conclusions (1) that the public-forum doctrine governed the case and (2) that the ordinance was not narrowly tailored. *Krantz*, 160 F.3d at 1218-19. As we have shown, *Taxpayers for Vincent* (and before that, *City of Greenburgh*) established that not all items that appear on public

streets are transformed into public fora. If public utility poles and private mailboxes located on public streets and sidewalks are not public fora, neither is a car windshield. And consistent with *Taxpayers for Vincent*, the Catlettsburg ordinance prohibits only the discrete problems it targets – littering on cars and the unauthorized use of private property to distribute or display a message – which is the pinnacle of narrow tailoring. *See* 466 U.S. at 810.

Three, *Krantz* in our view fails to account for the fundamental difference between traditional leafletting and the activities of Jobe and Krantz. Neither by tradition nor by design does the car windshield occupy a place in the long-accepted traditions of leafletting – whether hand-to-hand on public sidewalks or door-to-door in the neighborhood – or otherwise amount to a long-accepted communicative tool that governments may regulate only with the utmost care. And unlike traditional leafletting, Jobe's and Krantz's activities do not readily allow the recipient to opt out of receiving the flier and to opt out of the responsibility for disposing of it. While *Krantz* perhaps makes the best case for invalidating an ordinance like this one, it is not an analysis that we can accept.

IV.

For these reasons, we affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CASE NO. 02-129-HRW

LEONARD JOBE **PLAINTIFF**

v.

CITY OF CATLETTSBURG, KENTUCKY **DEFENDANT**

JUDGMENT

(Filed Jan. 26, 2004)

In compliance with Federal Rule of Civil Procedure 58, **IT IS HEREBY ORDERED** and **ADJUDGED** that the Plaintiff's Motion for Summary Judgment is **OVERRULED**, the Defendant's Motion for Summary Judgment is **SUSTAINED**, and that all issues having been resolved, this matter is **DISMISSED** and **STRICKEN** from the docket of this Court.

This is a **FINAL** and **APPEALABLE** Order.

This 21 day of January, 2004.

/s/ _____
Henry R. Wilhoit, Jr.
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CASE NO. 02-129-HRW

LEONARD JOBE **PLAINTIFF**

vs.

CITY OF CATLETTSBURG, KENTUCKY **DEFENDANT**

MEMORANDUM OPINION AND ORDER

(Filed Jan. 26. 2004)

* * *

This case is before the Court on the Plaintiff's Motion for Summary Judgment [Record No. 15], and Defendant's Cross-Motion for Summary Judgment [Record No. 16]. The Court has reviewed the record and, being sufficiently advised, now overrules the Plaintiff's motion, and sustains the Defendant's motion.

In his motion, Plaintiff Jobe challenges the constitutionality of Catlettsburg's city ordinance 113.05 "Placing Posters on Vehicles," which bans the placing of handbills or leaflets upon any automobiles within the city limits. The ordinance reads:

> It shall be unlawful for any person to place or deposit or in any manner to affix or cause to be placed or deposited or affixed to any automobile or other automotive vehicle any handbill, sign, poster, advertisement or notice of any kind whatsoever unless he is the owner thereof or without first having secured in writing the consent of the owner thereof.

The ordinance, on its face, appears to apply to all areas within the City of Catlettsburg, including private parking lots. Catlettsburg maintains that the ordinance was passed solely to prevent littering. Defendant Catlettsburg further states the ordinance "only prohibits the distribution of handbills where the owner has not accepted the proffer in advance by writing." (Defendant's Response. [#16], p.2). Violation of the ordinance is punishable by a fine of up to five hundred dollars ($500.00).

Leonard Jobe is the commander of American Legion Post 224 in Catlettsburg. Mr. Jobe has twice been found in violation of the above ordinance. Apparently Mr. Jobe places leaflets advertising the availability of drinking and gambling at Post 224 on cars in Catlettsburg.

According to the deposition testimony of Catlettsburg's mayor, the ordinance has only been enforced once since its passage – against the Plaintiff. Furthermore, the mayor testified that no one has ever complained to him or to his knowledge any other city official about the Plaintiff's leafleting. Plaintiff Jobe was convicted on March 11, 2002 in Boyd District Court for violating the ordinance, and received a $500 fine.

In his Motion for Summary Judgment, Mr. Jobe challenges the constitutionality of ordinance 113.05, claiming that it violates his right to free speech, the ordinance is overbroad, and therefore, facially invalid because it is not narrowly tailored to meet its stated goal of prevention of littering. Mr. Jobe also argues that the ordinance does not leave open ample alternative channels for communication as required by the Supreme Court's decision in *Ward v. Rock Against Racism*, 491 US 781 (1989). Additionally, Plaintiff contends that the Defendant

has not articulated a significant governmental interest to justify the broad scope of the ordinance.

Plaintiff Jobe's first contention is that the ordinance violates his right to free speech as guaranteed by the First Amendment. Plaintiff argues that an "integral part of free speech includes the right to distribute, circulate, or otherwise disseminate ideas and written materials." (Plaintiff's Motion, [#15], p. 7) He cites generally to the holdings in *Martin v. Struthers*, 319 U.S. 141, 143 (1943), (that a municipality cannot enforce a blanket ban on door to door leafleting), and *Lovell v. Griggin* [sic], 303 U.S. 444, 452 (1938), (that citizens have the right to distribute and receive materials in public places) in support of this proposition. He concludes this section arguing that the Defendant's ordinance is an invalid time, place, and manner restriction on a citizen's ability to distribute written materials.

Plaintiff Jobe next states time, place, and manner restrictions must be content neutral, narrowly tailored to serve a significant government interest, and must leave open ample alternative channels of communication. He correctly cites *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) in support of this proposition. Plaintiff concedes the ordinance is content neutral, but he argues the ordinance violates the narrowly tailored and alternative channels of communication prongs.

Plaintiff argues that Defendant's ordinance burdens "substantially more speech than is necessary to further the government's legitimate interests." (Plaintiff's Motion [#15], p. 8, quoting *Ward*, 491 U.S. 791.) He correctly notes that laws restricting speech in or on traditionally public forums have faced greater scrutiny. Plaintiff argues that since public streets are public forums for First Amendment

purposes, and cars are accessible on public streets, his exercise of his free speech rights (leafleting) cannot be broadly denied, and must only be denied for a good reason.

In support of this argument, Mr. Jobe largely relies upon *Krantz v. Fort Smith*, 160 F.3d 1214 (8th Cir. 1998). This case is very similar to the one at issue. In *Krantz*, the Plaintiffs, members of the Twentieth Century Holiness Tabernacle Church, appealed the Western District of Arkansas District Court's grant of summary judgment to the four defendant cities. "The district court granted summary judgment for defendants on plaintiffs' First Amendment claims seeking a declaration that the ordinances are unconstitutional because they prohibit plaintiffs from placing religious literature under the windshield wipers of unattended vehicles parked on public property." *Id.* at 1215. The ordinances at issue in Krantz made it "a misdemeanor for any person to place a handbill or advertisement on any other person's vehicle parked on public property within city limits, unless an occupant of the vehicle is willing to accept the handbill or advertisement." *Id.* at 1216. The defendants in *Krantz* argued that the purpose of the ordinances was to regulate the conduct of littering. The Eight [sic] Circuit held the ordinances "are unconstitutional because they are facially overbroad restrictions on free speech." *Id.* at 1215.

In reaching it's [sic] decision on narrow tailoring, the Eight [sic] Circuit discussed *Schneider v. New Jersey*, 308 U.S. 147 (1939). The Eighth Circuit noted that in *Schneider*, "the Supreme Court held that the governmental interest in preventing litter was insufficient to justify an ordinance that would have prohibited individuals from handing out literature to those willing to receive it." *Krantz*, at 1219. Further, "a city has the power to punish

individuals who throw leaflets on the ground, as opposed to those who hand leaflets out." *Id.* "The Supreme Court then concluded in *Schneider* that 'the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.'" *Id.* at 1219, quoting *Schneider*, 308 U.S. at 163. However, in *Schneider* the ordinance prohibited **all** forms of leafleting. It did not specifically deal with the limited question of leafleting of cars as in this case.

The Eight [sic] Circuit also discussed *Martin v. City of Struthers*, 319 U.S. 141 (1943). In *Martin* the City of Struthers enacted an ordinance making the door to door distribution of handbills illegal. Martin was convicted of and fined for violating the ordinance. The defendant city argued that its ordinance "advanced its legitimate governmental interests in protecting citizens from being disturbed in their homes" and preventing criminal activity. *Krantz*, at 1219. The Supreme Court found the Struthers ordinance facially invalid because it was not narrowly tailored. The Supreme Court stated, "[w]hile door to door distributors of literature may either be a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." *Martin*, 319 U.S. at 145.

The appellate court in *Krantz* concluded:

> Similarly, in the present case, the ordinances suppress considerably more speech than is necessary to serve the stated governmental purpose of preventing litter. The ordinances prohibit the placement of any handbill on any unattended vehicle, regardless of whether the driver, owner, or

> an occupant might wish to receive the handbill and notwithstanding the fact that some, if not most, people would not throw on the ground the papers left on their cars. While we have no difficulty concluding that the inconvenience of having to dispose of unwanted paper "is an acceptable burden, at least as far as the Constitution is concerned, that minor inconvenience is not even necessary in the present case because, like the householders in *Martin* and *Rowan*, those who do not wish to be left with handbills can quite easily notify distributors of that fact.

Id. at 1220.

Thus, the Eighth Circuit concluded that the ordinance in question was not narrowly tailored. The court also went on to note that the ordinance did not provide a "reasonable fit" between the harm (litter) and the regulation seeking to curb the harm because the [sic] Fort Smith had not adduced any evidence of a causal relationship between handbills placed on cars and litter. *See id.* at 1220-21.

Mr. Jobe argues that largely same situation exists in this case, but he notes that unlike Krantz, the City of Catlettsburg has not received a single complaint as a result of his activities. Additionally, the Plaintiff contends because the ordinance restricts the distribution of leaflets on parked cars, it is not narrowly tailored. Namely, that the ordinance burdens substantially more speech than necessary to prevent litter, and there is no evidence of a reasonable fit between the prevention of litter and banning leaflets and handbills. He states the exception to the ordinance for written consent from the vehicle owner should not help the ordinance survive scrutiny. Plaintiff again relies on *Krantz* to support his argument. He contends that the

presumption of the ordinance in *Krantz*, that people do not wish to receive leaflets on their cars and that there is no audience for this information, was found to be unconstitutional in *Martin*. The Plaintiff alleges that Defendant Catlettsburg's ordinance "operates under the same unconstitutional presumptions." (Plaintiff's Motion [#15], p. 11).

Plaintiff alleges the "exception for consent is impractical and burdensome on the leafletter and the potential recipients of the information." *Id.* at 12. He argues that instead of requiring consent, citizens of Catlettsburg who do not want leaflets could simply place a no soliciting sign on their cars. In support of this Plaintiff cites *Watchtower Bible and Tract Society of N.Y., Inc., v. Village of Stratton*, 122 S.Ct. 2080 (2002). In that case the Supreme Court invalidated a city ordinance prohibiting canvassers from entering on a person's property to promote for [sic] or solicit for any cause unless they first received permission, and the property owner had not posted a no solicitation sign. The Supreme Court held that the ordinance was too broad, and that the ability to post a no solicitation sign offered the property owner ample protection from unwanted visitors.

Plaintiff Jobe next argues because the ordinance bans the most effective means of disseminating information, it does not leave open ample channels for communication. He argues "[l]eafleting is a particularly valuable mode of communication because, for many people, it is the most efficient, accessible, and economic way to distribute their information." (Plaintiff's Motion, [#15], p. 13). Plaintiff continues that if he is barred from placing leaflets on windshields, he has [sic] does not have any other accessible or cost effective ways to disseminate information.

Finally, Mr. Jobe argues that the City of Catlettsburg has not articulated a significant governmental interest for the ordinance. Plaintiff states he understands the purpose of the ordinance is to control litter on the streets. Plaintiff continues "[t]he problem is the ordinance includes within its provisions a substantial amount of public forum speech that does not produce litter." (Plaintiff's Motion, [#15], p. 14). Further, he notes that the government's interests would be better served by pursuing those who ignore the car owner's requests (the no solicitation signs) not to place leaflets on their cars.

In conclusion, Plaintiff states that Catlettsburg's interest in preventing litter cannot support regulation broad enough to include non-littering within its sweep. He argues that since the Defendant cannot point to any instances when the [l]eafleting has been a problem, except when the Plaintiff leaflets, and since the recipients seem to welcome the leaflets, the Defendant's ordinance is unconstitutionally overbroad.

The Defendant City of Catlettsburg responds that the ordinance does not prohibit handing out literature to individuals in public, or prohibit going door to door to pass out flyers. The Defendant maintains these forms of communications are acceptable because the written communication could be handed directly to a person, and either accepted or refused. Defendant City of Catlettsburg argues what the ordinance in fact limits is the illegal trespass of Mr. Jobe upon the windshields of private vehicles, and "from making private vehicles his personal bulletin board, unless [he] has the owner's prior written consent." (Defendant's Response, [#16], p. 2).

Defendant Catlettsburg raises four main points in its Response/Motion. It first contends that Mr. Jobe's actions violate the right of the cars' owners to be left alone. The Defendant argues the real crux of the case is "whether someone must put a writing on their private personal property to keep it free of another's written communication." (Defendant's Response, [#16], p.3). The Defendant continues the "central controversy revolves around requiring individuals to accept written communications, whether they wish to do so, or not." *Id.* It contends that there is no limited trespass to place leaflets on vehicles, and "paper placed on another's private personal property without permission is litter." *Id.*

The Defendant distinguishes traditional leaflet cases from the present case. It notes that in traditional handbilling cases there is a proffer of the written material. With that proffer comes the recipient's ability to accept or decline the literature. Defendant contends that Plaintiff's actions make private property (i.e. a person's automobile) Mr. Jobe's personal billboard. Further, Defendant states that Plaintiff does this without prior permission of the other party, and without giving the other person the ability to decline the material. The Defendant City concludes "it is unacceptable to place written communications on an individual's personal property, unless the owner posts a sign saying that they will accept such communications and the consequent duty to dispose of the material." (Defendant's Response, [#16], p.4).

Defendant Catlettsburg's second argument is that the ordinance is not an undue restriction on free speech. It maintains that the ordinance's restriction is firmly rooted in First Amendment case law dealing with handbilling and door to door solicitations. Defendant recognizes that the

Supreme Court has "zealously guarded handbilling as one of the most traditional of American methods to set forth one's ideas, it has not, as Jobe believes, precluded all reasonable limitations on such methods." (Defendant's Response, [#16], p. 6).

Defendant Catlettsburg first notes that unlike traditional handbilling, Plaintiff Jobe does not give the recipient any choice to accept or decline. "He then claims that he has not littered, but that he has shifted the burden to properly dispose of his flyer from himself to the, most probably unwilling, drivers of the vehicles." *Id.*

Defendant City further maintains the "crux of Jobe's entire argument is that when a person's privately owned motor vehicle is parked on a public street it then apparently becomes public property for the purposes of the First Amendment." (Defendant's Motion, [#16], p. 8). The City asserts "[p]rivate autos and commercial vehicles do not become limited public forums simply by their being parked on a public roadway." *Id.* It continues property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corporation, LTD., v. Tanner*, 407 U.S. 551, 569 (1972). Defendant argues that the ordinance furthers individual's [sic] rights to receive handbills on their private property if they so desire.

The Defendant maintains there are differences in the *Krantz* ordinances that distinguish them from the ordinance in this case. It states that the ordinances in *Krantz* prohibit all handbills. The Defendant states the "Catlettsburg ordinance only prohibits handbills unless there has been a written acceptance by the owner to accept them." (Defendant's Response, [#16], p. 8). The City maintains

this could be done with "a simple sign such as 'Handbills OK' being placed in the vehicle's window." (Defendant's Response, [#16], p. 7). Defendant City maintains that Plaintiff's cases do not support the leap from completely private ownership to a public forum under the First Amendment.

Catlettsburg points to *Members of the City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), as authority for the proposition not all publicly accessible places are public forums. In *Vincent*, the Supreme Court stated the appellees' reliance on the public forum doctrine was misplaced when they affixed political flyers to public utility poles. The Court stated the appellees failed "to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks, and it is clear the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." *Id.* at 814. The City also notes that *Krantz* failed to consider this argument.

Catlettsburg's third argument is that the restrictions of the ordinance are reasonable in time, place and manner, because the ordinance merely regulates where speech may occur. Defendant notes that the Plaintiff relies heavily on the Eight [sic] Circuit's decision in *Krantz*. Defendant City maintains that although the facts of *Krantz* and the present case are similar, there is a very significant difference in the ordinances. The *Krantz* ordinances made no provision for someone to give written permission to accept leaflets. Whereas the Defendant states it's [sic] ordinance allows for placing leaflets on cars as long as there is a written acceptance of the proffer.

The City of Catlettsburg largely relies upon the recent Supreme Court case of *Hill v. Colorado*, 530 U.S. 703 (2000) to support its argument that the time, place, and manner restrictions are constitutional. Defendant correctly states that in *Hill* the Supreme Court applied the three prong test set out in *Ward v. Rock Against Racism*, and further explained the doctrine of narrow tailoring to a significant governmental interest, and alternative channels of communication. The Plaintiff and the Defendant agree that the Defendant's ordinance is content neutral, thus satisfying the first prong of the test. Defendant City alleges that under the analysis of *Hill* their ordinance passes the remaining prongs of the *Ward* test.

The *Hill* decision arises from protests conducted at abortion clinics. Colorado had passed a state statute which prevented any person located within a 100 feet [sic] of a health care facility from knowingly approaching another person to pass a handbill or leaflet without first having the passee's consent while engaged in oral protest, education, or counseling.

This statute was challenged as violating the First Amendment. The Supreme Court, in a 6-3 decision, upheld the statute. The high court found, among other things, that "[a]s we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Id.* at 726.

The Supreme Court did recognize that the eight foot barrier would prevent protesters from passing handbills or leaflets. However, it concluded that because persons

desiring to pass handbills could stand silently and pass the handbill, their was no constitutional infringement. *Id.* at 727.

Catlettsburg argues that under the tests put forth in *Hill* its ordinance passes constitutional muster. It states the purposes of the ordinance are to "help prevent litter and further keep litter off personal vehicles parked in the city." (Defendant's Response, [#16], p. 10). Defendant argues that these reasons are well within the city's police powers to advance esthetic values. Defendant also alleges that the another benefit of the ordinance is that it "protects the rights of citizens 'to be let alone' and not be subjected to others trespassing by using their personal vehicles as a method of communication." *Id.* The City argues that this is another proper use of it's [sic] police powers.

The Defendant next contends that like *Hill*, the ordinance only regulates where some speech may occur, i.e. under the windshield wipers of cars. It states "[l]ike the statue in *Hill* Catlettsburg's ordinance 'simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners.'" (Defendant's Response, [#16], p.12, quoting *Hill* at 723.) The City maintains that nothing prevents Jobe from going door-to-door to distribute his literature or standing in the streets and pass handbills to passing drivers. Because of these alternative opportunities, the Defendant contends the ordinance is narrowly tailored to meet its goal of preventing litter. Thus, the statute is not overbroad, and since the Plaintiff does not challenge that the ordinance is content neutral or that it serves a compelling government interest, the statute should be upheld.

Further, Defendant City argues that *Hill* "expanded the prohibition against unwanted speech when it acknowledged that persons have a right 'to be let alone.'" (Defendant's Response, [#16], p.11, quoting *Hill*, at 718.) Defendant contends Plaintiff Jobe has chosen a method of leafleting where there is no chance to decline the tendered material, and it is left on the vehicle without "any such safeguard of the driver's privacy or right to reject such material." (Defendant's Response, [#16], p.13). Defendant argues, "[w]hat is consonant with the Supreme Court decisions on handbilling, is that a person, in abstentia, could leave a sign that it was acceptable to leave handbills on the vehicle – much in the same fashion that one accepts a proffered handbill on the sidewalk. This is precisely the Catlettsburg ordinance." *Id.*

Defendant City attempts to further distinguish *Krantz*. It notes while the *Krantz* ordinances banned all handbilling, the Catlettsburg ordinance only bans handbilling if the owner of the car has not given prior written permission that the owner will accept the leaflet. Additionally, Defendant City contends *Krantz* never considered the vehicle owner's right to be let alone, nor did it consider "the constitutional ramifications of its ruling, which turned private personal property into a public forum by making a person's private auto into a bulletin board for other's leaflets simply because it was parked on public property." (Defendant's Response, [#16], p.14).

Finally, the City argues that the ordinance is not overbroad, nor does it fail to leave alternative channels of communication. It notes that unlike the *Krantz* case, the ordinance in question does not prevent all leafleting of cars. The Defendant City argues that the ordinance does not prevent Plaintiff Jobe from handing people flyers as

they approached their vehicles. It does not prohibit door-to-door leafleting or mailings. Rather it only prevents leaflets on cars without prior written permission.

Defendant maintains that since vehicle owners have no way of accepting or rejecting Plaintiff's leaflets, Mr. Jobe "litters each and every time he places his leaflets under a private vehicle's windshield wipers when he does not have the prior written permission to do so by the owner." (Defendant's Response, [#16], p. 17). The City argues that the ordinance keeps the Plaintiff from forcing his leaflets on people who do not want them, and helps prevent unwanted trash. The City states for these reasons the ordinance should be upheld, and this case dismissed.

In his Reply, Mr. Jobe states that in fact the ordinance does prohibit all leaflets without prior written consent. Jobe contends that there are many ways of preventing litter less restrictive of free speech other than banning leaflets. Also, he notes that neither government interest advocated by the Defendant – littering or private rights in vehicles – will support the ordinance as a compelling government interest. Plaintiff argues that the ordinance substantially burdens more speech than necessary to further the government's interest, and thus, the ordinance is not narrowly tailored. Mr. [sic] He also maintains "the record reveals that Catlettsburg does not even have a littering problem resulting from leaflets on parked cars." (Plaintiff's Reply, [#19], p. 4). Therefore, "the City's comprehensive ban on leafleting parked cars thus fails even to provide a reasonable fit between Catlettsburg's asserted goal and the means the city has chosen to accomplish it." *Id.*

As to the argument that Mr. Jobe's activities violate the private rights of individual car owners, Mr. Jobe responds that there is no authority for such a proposition. Additionally, Mr. Jobe believes that placing leaflets on cars is no more of a trespass than knocking on the front door of a person's home and giving them a leaflet.

Plaintiff closes by stating the ordinance does not leave open ample alternative channels of communication. He asserts the Defendant's argument ignores his point that "by leafleting centrally parked cars, Jobe can efficiently and cheaply reach a wide range of people." (Plaintiff's Reply, [#19], p.6). Plaintiff contends that by banning his most cost effective and time saving method, he is left with few viable alternative channels of communication. Plaintiff reasons therefore the City's ordinance is unconstitutional.

The Supreme Court in *Hill* stated "while the freedom to communicate is substantial, 'the right of every person to be let alone must be placed in the scales with the right of others to communicate." *Hill*, at 718, quoting *Rowan v. United States Post Office Department*, 397 U.S. 728, 736 (1970). The Court went on to state "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, at 726. It appears that even though Defendant City forecloses a viable method of Plaintiff's ability to communicate, it does not totally prohibit the Plaintiff's ability to express himself.

Unlike the ordinances at issue in the *Krantz* decision, the Catlettsburg ordinance does not prohibit all leafleting

of cars. The Catlettsburg ordinance only prohibits leafleting of cars without the prior written approval of the car owner. This gives the car owner the ability to accept or decline the leaflet, as is the case in traditional leafleting scenarios. As the City notes, if the car owner wanted to receive leaflets, the car owner could easily give his approval by placing a sign in his car window. If the car owner accepts the leaflets, then he is responsible for disposing of the leaflet.

The Supreme Court stated in *Vincent*, "[a]s the Court expressly noted in *Schneider*, the First Amendment does not 'deprive a municipality of power to enact regulations against throwing literature broadcast in the streets.'" *Vincent*, at 809, quoting *Schneider*, at 308. Plaintiff Jobe's leaflets are akin to casting literature into the streets. Without the ordinance, the car owner does not have a choice to accept or decline the leaflet. The car owner gets a leaflet whether he wants one or not. It is logical to assume that a person who receives an unwanted leaflet is likely to get rid of it in the easiest and quickest fashion, either by using a trash can, or if one is not convenient, by tossing it on the ground. Thus it appears Catlettsburg is justified in its concerns about decreasing the spread of litter.

The ordinance does not prohibit Plaintiff Jobe from personally handing out leaflets to people on the street or in other public places, nor does it prohibit him from posting his flyers on public bulletin boards. Rather, the ordinance furthers the city's proper police power of preventing litter. (*See Schneider*, at 160, stating "a municipality may enact regulations in the interest of public . . . convenience," as long as Constitutional liberties are not infringed upon.).

For these reasons, the Court feels Catlettsburg's city ordinance is constitutionally justified. While the ordinance is not the least restrictive means available to stop the spread of litter, it is unquestionably content neutral, and does not foreclose other of the Plaintiff's means of communication. As previously noted, Plaintiff Jobe has several avenues, other than leafleting of parked cars, in which to advertise and broadcast his message.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED THAT:

(1) the Plaintiff's Motion for Summary Judgment is **OVERRULED**;

(2) the Defendant's Motion for Summary Judgment is **SUSTAINED; and**

(3) a final judgment shall this day enter. This 21 day of January, 2004.

/s/ Henry R. Wilhoit, Jr.
Henry R. Wilhoit, Jr.
Senior District Judge

No. 05-188

Supreme Court, U.S.
FILED
AUG 25 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LEONARD F. JOBE,

Petitioner,

v.

CITY OF CATLETTSBURG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does an ordinance prohibiting the placement of leaflets on private motor vehicles without the owner's written consent when the vehicles are parked on public property violate the First Amendment?

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STATEMENT OF THE CASE

The conflict between the City of Catlettsburg and Leonard Jobe began when Jobe was fined for two violations of Catlettburg's City Ordinance 113.05, enacted in 1952, which prohibits the placing of leaflets, posters, or other printed material on automobiles, without the owner's prior written consent. Jobe's pamphlets were commercial speech touting the benefits of drinking and gambling at American Legion Post 224, where he is the local commander. After paying his fine, he instituted an action in U.S. District Court for the Eastern District of Kentucky professing his desire to again pass out handbills and claiming the ordinance violated his First Amendment rights. [Complaint]

The current Mayor of Catlettsburg is unaware of anyone else violating this 1952 ordinance or anyone else being prosecuted for the same. [Deposition of Mayor Hensley, pp. 10, 13-14] There does not appear to be any current littering problem in the City of Catlettsburg from handbills, which is not surprising as the only person in recent memory violating the over fifty year old ordinance was Jobe. [Deposition of Mayor Hensley, pp. 20-21] The parties agree that the ordinance is content neutral.

SUMMARY OF ARGUMENT

The Court should not issue a writ of certiorari as the ordinances considered by the Eighth and Sixth Circuits are dissimilar in that the City of Catlettsburg ordinance permits vehicle owners to grant written permission to allow the placement of leaflets on their private motor vehicles, and so accept responsibility for the subsequent

disposition of the leaflet. The Sixth Circuit decision correctly balances the private property rights of vehicle owners and the need of the City of Catlettsburg to curb litter, with the time honored right to distribute handbills or leaflets cheaply and efficiently to those willing to receive them.

REASONS FOR DENYING REVIEW

When faced with somewhat similar, but not "virtually identical" ordinances, the Sixth and Eighth Circuits came to different conclusions about the ability of a city to pass an ordinance regulating handbilling or leafleting on private motor vehicles parked on public property. The ordinance considered by the Eighth Circuit prohibited all handbilling on vehicles. The ordinance considered by the Sixth Circuit prohibited handbilling on vehicles only when the owners had not given their prior written consent to accept the handbill. Only the Sixth Circuit came to the proper constitutional conclusions concerning the ordinance before it.

I. THE COURT DOES NOT NEED TO RESOLVE A DIRECT CIRCUIT SPLIT

The Sixth Circuit candidly admitted that its decision "likely would have come out differently had we followed *Krantz*." *Jobe v. City of Catlettsburg,* 409 F.3d 261, 273 (6th Cir. 2005) referring to *Krantz v. City of Fort Smith,* 160 F.3d 1214 (8th Cir. 1998), *cert. denied*, 527 U.S. 1037 (1999). The reason it did not was that the Sixth Circuit was compelled to follow the precedent set by this Court in deciding the case before it.

As the Sixth Circuit pointed out, the Eighth Circuit's analysis was flawed for a number of reasons. *Jobe*, 409 F.3d at 273-274. *Krantz* failed to address this Court's decision in *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) or to distinguish it in any fashion. *Jobe*, 409 F.3d at 274.

The Eighth Circuit assumed that privately owned motor vehicles on public property became a public forum, without giving any explanation for the apparent transformation from private property to public forum. *Krantz*, 160 F.3d at 1218.

Krantz assumed that the control of litter on public property was not a significant governmental function. *Krantz*, 160 F.3d at 1219-1221. *Krantz* then found its ordinances not to be narrowly tailored to prevent litter. *Krantz*, 160 F.3d at 1221.

The Sixth Circuit in *Jobe* found just the opposite, and further found that the Catlettsburg ordinance permitted the owners of the private vehicles to accept the proffered handbills, in much the same way the owners could have done so in person. *Jobe*, 409 F.3d at 271.

The Eighth Circuit never considered the right of the owners of the private vehicles and their property to be "left alone", as was later reiterated by this Court in *Hill v. Colorado*, 530 U.S. 703, 716-717 (2000). The *Krantz* court assumed that the recipient wished to receive the handbill because there was no sign on the vehicle rejecting it. *Krantz*, 160 F.3d at 1220. *Krantz* failed to address the proffer and acceptance of traditional handbilling. As a result, *Krantz* shifted the burden for disposing of the handbill from the handbiller to an oblivious recipient

without the necessity for the recipient to accept the handbill.

A. The Ordinances Are Similar Only Because They Both Prevent Litter by Handbillers.

The ordinances considered respectively by the Sixth and Eighth Circuits are not "virtually identical". Catlettburg's Ordinance 113.05, enacted in 1952, considered by the Sixth Circuit in *Jobe*, 409 F.3d at 262-263, prohibits the placing of leaflets, posters, or other printed material on automobiles, without the owner's prior written consent:

> It shall be unlawful for any person to place or deposit or in any manner to affix or cause to be placed or deposited or affixed to any automobile or other automotive vehicle any handbill, sign, poster, advertisement or notice of any kind whatsoever unless he is the owner thereof or without first having secured in writing the consent of the owner thereof.

The ordinance considered by the Eighth Circuit in *Krantz,* 160 F.3d at 1216, prohibited all leaflets on vehicles, with no provision for the owner of an unoccupied vehicle to accept a handbill:

> SECTION 3. It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill or other hand-distributed advertisement upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, [or] alley within the City of Van Buren, providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to

> the receiver therefor, any handbill to any occupant of the vehicle that is willing to accept it.

The constitutional effect of the difference between the first half of the *Krantz* ordinance and that of the City of Catlettsburg is significant. The Catlettsburg ordinance specifically allows an absent owner to accept a handbill, and sets forth a simple way to demonstrate to handbillers that the owner is willing to accept the proffer and subsequent duty to properly dispose of the handbill: the owner puts it in writing – given either directly to the handbiller or placed in the vehicle where it could be seen. Either method would satisfy the ordinance. Oral permission is not anticipated, since if one were there to give oral permission, then the person could also accept the handbill as well. *Jobe*, 409 F.3d at 271.

The first half of the *Krantz* ordinance completely forecloses the ability of an absent, but willing recipient to accept the proffer. The second half of the *Krantz* ordinance is not significant as it merely reiterates the long held constitutional right to accept or decline a proffered handbill in person.

One effect of *Krantz* is to turn a private vehicle into a public bulletin board for the views of others unless the owner posts a "No Soliciting" sign. If, as *Krantz* contends, paper handbills can be involuntarily placed on a private vehicle, then why not signs, visible to the public that may promote political candidates, religions, or other causes, such as drinking and gambling, which may or may not be consonant with the views of the owner of the vehicle? A handbiller could hand out magnetic signs and bumper stickers on the street corner and such handbilling is entirely constitutional. The Catlettsburg ordinance in *Jobe*

covers any items attached to the vehicle without the owner's consent.

The *Krantz* decision makes the oblivious recipient legally responsible for the disposition of the handbill from the moment it is placed on the vehicle and legally liable for littering, should the handbill blow off the vehicle.

The Sixth Circuit in *Jobe* only shifted this legal duty to dispose of the handbill to a person willing to accept the handbill *and* the subsequent legal duty to dispose of it, when communicated by the owner in writing.

B. The Circuits Disagree on Whether a Private Vehicle on the Public Roadway Is a Public Forum.

While the street itself is a public forum, the private auto parked on it is not. It is not even public property of any kind. If the private vehicle parked on public property is a non-public forum, then any restriction need only be reasonable. *U.S. v. Kokinda*, 497 U.S. 720, 730 (1990).

The Eighth Circuit in *Krantz* never explained its reasoning as to how a private motor vehicle parked on public property was transformed into a public forum. *Krantz*, 160 F.3d at 1218.

The Sixth Circuit did explain its reasoning on the choice of forum, correctly determining that private vehicles were not public fora, and as such, any regulation of communication on them need only be reasonable. *Jobe*, 409 F.3d at 267.

C. The Circuits Disagree That Preventing Litter Is a Valid Governmental Function.

The Sixth and Eighth Circuits also disagree on whether or not littering, the placing of material on a person's private property is, in and of itself, cause to prohibit handbilling on unoccupied private vehicles parked on public property. *Krantz,* 160 F.3d at 1220. *Jobe,* 403 F.3d at 268. *Krantz,* 160 F.3d at 1218, failed to address the private property rights of the vehicle owners to be "let alone", merely assuming that a private vehicle on the public streets was transformed into a public forum.

The Sixth Circuit held that "Placing unrequested fliers on a car windshield (or some other part of the car) shares as many qualities with littering as placing the fliers on the front lawn of a residence, on the top of a boat or for that matter on top of any piece of private property that is not otherwise designated by intent or usage to receive and hold literature distributed by others." *Jobe,* 409 U.S. at 273-274.

This Court need not grant review to resolve this conflict between the Circuits. Only the analysis of the Sixth Circuit correctly applied the precedent set by this Court to the ordinance before it.

II. THE SIXTH CIRCUIT CORRECTLY APPLIED *TAXPAYERS FOR VINCENT* AS WELL AS THE PRECEDENT SET IN OTHER CASES BY THIS COURT.

Leonard Jobe attempts to distinguish the Sixth Circuit's following of this Court's analysis of where and how communications may be regulated in *Taxpayers for*

Vincent because following that precedent is fatal to his case.

A. A Private Vehicle on a Public Street Is Not a Public Forum.

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communication thoughts between citizens, and discussing public questions." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). The Eighth Circuit, in *Krantz,* never explained why private vehicles were a public forum, only that the parties conceded that public streets and parking lots are public forums. *Krantz*, 160 F.3d at 1218.

Even if, *arguendo*, being parked on a public street somehow converts a private auto into some type of public forum it is, at the very worst from an owner's standpoint, a limited public forum. " . . . it is clear that the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government. . . . Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *Taxpayers for Vincent,* 466 U.S. at 814.

This Court in *Taxpayers for Vincent*, 466 U.S. at 814, as quoted in *City of Ladue v. Gilleo*, 512 U.S. 43, 50 (1994) " . . . rejected as 'misplaced' respondents' reliance on public forum principles, for they had 'fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles . . . comparable to that recognized for

public streets and parks.'" Neither *Krantz*, nor any other case has identified any "traditional right of access" to private motor vehicles, or for that matter their progenitors: privately owned horses, wagons, carriages or bicycles. Handbilling is far from cutting edge technology and motor vehicles are only the latest step in our "mobile society."

"The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *U.S. v. Kokinda*, 497 U.S. 720, 730 (1990), citing *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 808 (1985).

This Court, in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992), discussed the difference between private and public ownership of transportation facilities, concluding that " . . . neither by tradition nor purpose can the terminal be described as satisfying the standards we have previously set out for identifying a public forum." When coming to this conclusion this Court noted that " . . . much of the evidence is irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had private ownership." *Lee*, 505 U.S. at 681.

Since private motor vehicles are privately owned, they, at the very least, do not rise above the level of limited or nonpublic forum. As such, any restriction of a limited or non-public forum need only be "reasonable; it need not be the most reasonable or the only reasonable limitation . . . ". *Lee*, 505 U.S. at 683, citing *Kokinda*, 497 U.S. at 730.

Despite this Court's guidance in *Taxpayers for Vincent, Kokinda, Lee,* and *Cornelius,* the Eighth Circuit in *Krantz*,

160 F.3d at 1220, held that a handbiller cannot be restrained from publishing his speech on private vehicles parked on public property, unless the owners post a sign prohibiting handbilling. Nowhere is this leap from completely private ownership to a public forum under the First Amendment supported except by *Krantz*.

The *Krantz* decision results in an oblivious vehicle owner, because of the absence of a "No Soliciting" sign, being responsible for littering if the handbill blows off before the owner of the vehicle returns. The result is absurd.

B. Preventing Litter Is a Valid Governmental Function.

Keeping the streets clean and free of debris is a traditional government interest and one that many communities take seriously enough to purchase street sweepers and to use valuable and expensive employee time and effort to ensure is done properly. This Court in *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 451 (1938), while striking down an ordinance for being too broad because it covered every sort of circulation, noted that it found the ordinance offensive because: "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse **or littering of the streets**. [Emphasis added] The City of Catlettsburg's ordinance is precisely what was contemplated by this Court in *Lovell*.

"A distributor of leaflets has no right simply to scatter his pamphlets in the air – or toss large quantities of paper from the window of a tall building or a low flying airplane.

Characterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance." *Taxpayers for Vincent*, 466 U.S. at 810.

The Sixth Circuit in *Jobe* noted that: "Placing unrequested leaflets on privately owned cars, moreover, amounts to a form of littering no less than placing leaflets on privately owned lawns or directly on the public streets. There is nothing special about a car – or for that matter, about a bicycle, a baby stroller, an individual's back or a lawn – that invites others to place leaflets or advertisements on it without the owner's consent." *Jobe,* 409 F.3d at 270.

"Here, the substantive evil – visual blight – is not merely a possible by-product of the activity, but is created by the medium of expression itself."[1] *Taxpayers for Vincent*, 466 U.S. 809-810. When depositing leaflets on private autos, the substantive evil – litter – is not merely a possible by-product of the activity, but is created by the medium of expression itself. Litter is the placing of substances on the property of another, without the other's prior consent to accept the material and consequent duty to dispose of it.

This Court in, *Taxpayers for Vincent,* 466 U.S. at 817, held that " . . . if the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, 'then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.' [Citing *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 508 (1981)] . . . We hold that on this record these

[1] Justice Black of this Court (dissenting in part) upholding the ban on posters on light poles.

interests are sufficiently substantial to justify this content-neutral, impartially administered prohibition against the posting of appellees' temporary signs on public property and that such an application of the ordinance does not create an unacceptable threat to the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'". Citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The Sixth Circuit merely followed this Court's precedent in its analysis.

C. The Sixth Circuit Gave Handbilling the Protection Demanded By Precedent Finding The Restriction on Handbilling to be Narrowly Tailored.

Even assuming, *arguendo*, that private vehicles on public streets are public fora, the Catlettsburg ordinance still meets the tests of being narrowly tailored to serve a compelling state interest and does not unreasonably limit alternate avenues of expression set forth by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

There are four prongs to the test set forth in *Ward* and expanded in *Hill*, 530 U.S. at 703. In both *Krantz* and *Jobe* the ordinances were content neutral, as they both addressed all handbills, whether they were political, religious, or commercial in nature, which satisfies the first prong of the test.

This Court in *Hill*, applying the *Ward* test, explained what is "narrow tailoring", significant government interests, and alternative channels of communication. The Catlettsburg ordinance passes this test as it is content

neutral and only regulates "where some speech may occur" – it may not occur under the windshield wipers or anywhere on vehicles parked on the public street, and left open all of the traditional methods of communication. *Jobe*, 409 F.3d at 267-270.

Catlettsburg's ordinance "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners." *Hill,* 530 U.S. at 723. "As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 503 U.S. at 726.

This Court then went on to specifically review the ability of the speakers to distribute handbills, noting that denying such ability is more serious. *Hill* found that the eight foot approach restriction to unwilling recipients did "not prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept. **And, as in all leafletting situations, pedestrians continue to be free to decline the tender.**" [Emphasis added] *Hill*, 530 U.S. at 727.

The Catlettsburg ordinance does not in any fashion serve to stop or limit a handbiller's message – it, in the words of this Court in *Hill*, 530 U.S. at 731, " . . . merely regulates the places where communications may occur." As this Court noted in *Hill*, 530 U.S. at 729, "A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself."

The "bright line" rule in *Jobe* holds that communications may occur under the windshield wipers or on private motor vehicles parked on public property only with the owner's permission. *Jobe*, 409 F.3d at 273. The Sixth Circuit in *Jobe* correctly concluded that the person responsible for the unwanted paper on the vehicles and streets of the city is the person who placed it there.

D. The Sixth Circuit Decision Preserved the Owner's Rights to Their Private Property.

This Court, even while rejecting a ban on the use of the sidewalks around the Supreme Court building itself, noted "We have regularly rejected the assertion that people who wish to 'propagandize protests or views have a constitutional right to do so whenever and however and wherever they please'." *U.S. v. Grace*, 461 U.S. 171, 178-179 (1983) "The Government, '**no less than a private owner of property**, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" [Emphasis added] *U.S. v. Grace*, 461 U.S. at 179.

"We reject that the validity of the city's esthetic interest had been compromised by failing to extend the ban to private property, reasoning that the 'private citizen's interest in controlling the use of his own property justifies the disparate treatment.'" *City of Ladue*, 512 U.S. at 50, citing *Taxpayers for Vincent*, 466 U.S. at 811.

The Sixth Circuit noted: "A windshield wiper is not a communications device and has never taken on the trappings of one. . . . Unlike a telephone, a mailbox, a computer or the well-trodden path to the front door, the

windshield wiper does not exist, formally or informally to encourage communication." *Jobe*, 409 F.3d at 227.

This Court "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). A person's private automobile is not similar in any fashion to a shopping mall, was never designed to be used as a communication device, nor does its presence on the public way transform it from private property into a public forum for others.

This Court in *Lloyd*, 407 U.S. at 569, noted that "nor does property lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd*, 407 U.S. at 570, when discussing privately owned shopping centers, noted "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights."

Nowhere is the leap from completely private ownership to a public forum under the First Amendment made except in *Krantz*, 160 F.3d 1214.

E. Only the Sixth Circuit Correctly Balanced the Rights of Handbillers with the Rights of Those Willing to Receive Them.

The City of Catlettsburg's 1952 ordinance on how handbills may be disseminated has its genesis in the First Amendment cases of the late 1930's and early 1940's which dealt with restrictions on door to door solicitations and traditional handbilling on city streets. Handbilling or

leafleting, with its proffer and acceptance, has long been protected by this Court as an important aspect of free speech. *Schneider v. State of New Jersey*, 308 U.S. 147 (1939); *Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943); *Lovell*, 303 U.S. at 444.

This Court has zealously guarded handbilling as one of the most traditional of American methods to set forth one's ideas; however, it has repeatedly stated that this is "Freedom to distribute information to every citizen ***wherever he desires to receive it*** . . . " and that "the dangers of distribution can so easily be controlled by traditional legal methods, ***leaving to each householder the full right to decide*** whether he will receive strangers as visitors . . . " [Emphasis added] *Martin*, 319 U.S. at 146-147.

This Court has always been adamant that traditional handbilling cannot be abridged: "We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street ***from handing literature to one willing to receive it.***" *Schneider*, 308 U.S. at 162. "The right recognized in *Schneider* is to tender the written material to the passerby who may reject it or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground." *Taxpayers for Vincent*, 466 U.S. at 809-810.

This Court has never forced the receipt of the proffered communication on an unwilling or unresponsive person. This Court recently validated the long held right of persons to be "let alone" when imposing reasonable restrictions on leafleting in *Hill*, 530 U.S. at 703. The Eighth

Circuit in *Krantz* completely missed the point that while one side of the free speech is the right to put forth one's views, the other side is that the intended recipient has the right to decide to receive *or* to decline to receive such communication. Only when the passerby *accepts* the proffer may the handbiller complete the dissemination of his or her ideas. A handbiller does not have a "right" to force the handbill in the pocket or hands of a non-responsive passerby. *Hill*, 530 U.S. at 718.

This Court's discussion of the right of privacy in *Watchtower Bible and Tract Society of N.Y. v. Village of Stratton*, 536 U.S. 150, 168 (2002), where the complained of ordinance did allow for "No Solicitation" signs on houses, validated the section of the ordinance " . . . which provides for the posting of 'No Solicitation' signs and which is not challenged in this case, **coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors**, provides ample protection for the unwilling listener." [Emphasis added] "We have 'never intimated that the visitor could insert a foot in the door and insist on a hearing.'" *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). " . . . in striking down a complete ban on handbilling, we spoke of a right to distribute literature only 'to one willing to receive it'." *Frisby*, 487 U.S. at 485.

"There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Schneider*, 308 U.S. at 162. The Catlettsburg ordinance does just this – it prohibits litter: the placing of items on private personal motor vehicles, when the owner has not consented in advance to such placement. It even goes beyond what could be required.

As this Court noted in *Taxpayers for Vincent*, 466 U.S. at 809, "The rationale of Schneider is inapposite in the context of the instant case. There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene. In this case, appellees posted dozens of temporary signs throughout an area where they would remain unattended until removed."

Like the persons who place signs on light poles, handbillers are usually long gone when the owners of the vehicles reappear to find their vehicles festooned with fliers, where they "remain unattended until removed."

Nothing in the Catlettsburg ordinance prohibits handbillers from placing handbills on the vehicles of those "willing to receive them." All those "willing" need do is provide a writing showing that they are indeed "willing" – willing to accept the handbill as well as the duty to dispose of it when they are done. To assume otherwise is to force those who are silent and unwilling to accept ideas forced on them and force them to dispose of the chosen method of communication.

F. The Sixth Circuit Decision Left Open Ample Alternative Channels of Communication.

Handbillers in Catlettsburg retain their constitutional right to go door to door with handbills and messages, which this Court recently reaffirmed in *Village of Stratton*, 536 U.S. at 150. Handbillers also retain the ability to stand on the street and hand flyers to all who would accept them. *Schneider*, 308 U.S. at 147. *Jamison v. State of Texas*, 318 U.S. 413 (1943). In Catlettsburg, the

handbiller could stand beside the vehicles and proffer the handbills to the drivers as they approached their vehicle, as there is no restriction in the Catlettsburg Ordinance on approaching a person, which restriction the Supreme Court found constitutional in *Hill,* 530 U.S. 551.

Handbillers also retain the ability to place signs on their own property. *City of Ladue*, 512 U.S. at 43. There this Court found a ban on almost all residential signs violated the First Amendment. The signs, however, were intended to be placed there by the owners of the property or with their permission. At no point did this Court mandate that others may place the signs without the owner's permission. Even if "residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." *City of Ladue,* 512 U.S. at 57.

The "poorly financed causes of little people"[2] in Catlettsburg retain all of the traditional methods for dissemination of ideas. They even have the non-traditional right to place handbills on personal autos when the owners have given their written permission to accept the proffer. As such, the Catlettsburg ordinance fully meets not only the letter but the spirit of the constitutional right to handbill. What handbillers do not have is the right to trespass on a person's private property to turn it into their personal bulletin board. Catlettsburg could have chosen to preclude all handbills on vehicles. It did not do so.

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[2] *Martin*, 319 U.S. at 146.

This Court has never transformed a person's private vehicle into a public forum. This Court has never forced an indifferent passerby to accept a handbill forced on them. Nor has it shifted the burden to dispose of handbills where the passerby is silent. It should not do so now.

CONCLUSION

The Sixth Circuit decision correctly balanced the rights of the city to control litter and the right of private vehicle owners to keep their personal property litter free, with the First Amendment right of Leonard Jobe to place leaflets on private vehicles when the owners had expressed their willingness to receive them in writing.

The guidance of the *Hill* decision on handbilling and the right of intended recipients to be "left alone" was not available to the Eighth Circuit when deciding *Krantz*. The right of the city to regulate litter as discussed in *Taxpayers for Vincent* was not properly taken into account by the Eighth Circuit nor did it explain the transformation from private vehicle to public forum simply because the vehicle was parked on the public way.

For all these reasons, the City of Catlettsburg respectfully requests that this Court deny the petition for a writ of certiorari, as *Jobe* was correctly decided.

Respectfully submitted,

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